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C.Perry Patterson

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THOMAS JEFFERSON AND THE CONSTITUTION

By C. PERRY PATTERSON*

"The preservation of the Federal Constitution is all we need contend for."—Jefferson

"Our national Constitution, the ark of our safety, and grand palladium of our peace and happiness."—Jefferson

It has been said that "the Reformation substituted an infallible Bible for an infallible Pope and the American Revolution a Constitution for a King." In each instance, a document, in the one a divine law and in the other a fundamental law, had displaced an absolute ruler—a government of law in both religion and politics had superseded a government of man. These were tremendous and significant changes in the interest and freedom of the individual in both religion and politics. There remained, however, one important matter—what was the meaning of the document?

Many of the forefathers realized that the establishment of a government of law involved much more than merely drafting and adopting a constitution for its basis. Some even doubted that a fundamental law could be maintained or that a government of law could supersede a government of man. John Francis Mercer, a delegate to the Federal Convention from Maryland, said on the floor of the Convention: "It is a great mistake to suppose that the paper we prepare will govern the United States. It is the men whom it will bring into the government and interest in maintaining it that is to govern them. The paper will only mark out the mode and the form. Men are the substance and must do the business."¹ Patrick Henry in the Virginia ratifying convention said: "It is not on that paper before you we have to rely should it be received; it is those who may be appointed under it. *It will be an empire of men, and not of laws.*"² While the Constitution was being considered for adoption, a friend said to Gouverneur Morris, "You have given us a good Constitution." "That depends," said Morris, "on how it is *construed.*"³

It is clear from these quotations as well as from reason that the chief problem in maintaining a fundamental law is that of inter-

*Professor of Government, The University of Texas.

¹Max Farrand, *The Records of the Federal Convention*, II, 289.

²*Elliott's Debates*, 3, 577. All italics in the text were supplied by the writer of this article.

³Quoted by Edward S. Corwin, *Court Over the Constitution*, (1938) 228.

pretation. Bishop Hoadly in the seventeenth century said: "Whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law-Giver to all intents and purposes, and not the person who first wrote or spoke them."⁴ Justice Holmes maintained that a judicial decision involves at every step "the sovereign prerogative of choice."⁵ Chief Justice Stone while Associate Justice said: "While unconstitutional exercise of power, by the executive and legislative branches is subject to judicial restraint, *the only check on our exercise of power is our own sense of self-restraint.*"⁶ Here is asserted the supremacy of the Court to exercise constituent powers. Justice Frankfurter prior to his appointment to the Court, speaking of the respective roles of national control and state authority, said: "The words of the Constitution on which their solution is based are *so unrestrained* by their intrinsic meaning, or by their history, or by tradition, or by prior decisions, that they leave the individual justice *free*, if indeed they do not compel him to gather *meaning not from reading the Constitution but from reading life.*"⁷ He further referred to "the neutral language of the Constitution."⁸

In view of the apprehensions of the forefathers as to the problem of maintaining a fundamental law and in the light of the history of more than a century and a half of loose construction of the Constitution, with the exception of the period from the late thirties to the early sixties covered by the Andrew Jackson Court, ending in complete uncertainty as to the meaning of the Constitution—a document of neutrality, we are in a more favorable position than ever before to evaluate Jefferson's constitutional principles.

The Establishment of Fundamental Law

The doctrine of a fundamental law was a basic principle in the American Revolution. The first problem facing the forefathers, following the Revolution, was the establishment of fundamental laws for their state constitutions. Jefferson made the greatest contribution to the solution of this problem. In the first place, he announced in the Declaration of Independence the basis of a fundamental law when he said that governments derive "*their just powers from the consent of the governed.*" Here is the announcement of the doctrine

⁴Quoted by J. C. Gray, *The Nature and Sources of Law*, (1921).

⁵Edward S. Corwin, *The Twilight of the Supreme Court*, (1934) 115.

⁶*United States v. Butler*, (1936) 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477.

⁷Felix Frankfurter and James Landis, *The Business of the Supreme Court*, (1927) 309.

⁸*Ibid.*, 310.

of popular sovereignty—the basis of a fundamental law which is differentiated from statutory law by being an extraordinary enactment of the people in their original sovereignty. It is this basic fact that gives it supremacy over the acts of government and makes government the mere agent of the sovereign will.

There remained the problem of actually establishing a fundamental law. It was obvious that the making of such a law could not be done by a legislative body because the creator is superior to the creature. Such a process would mean legislative supremacy and not constitutional supremacy. New machinery and processes separate and distinct from legislative or governmental control would have to be devised for this task. History furnished no precedent. Heretofore governments had been established by force and in no instance were their foundations rested upon “the consent of the governed.”

The solution of this problem was a prerequisite of a government based on a fundamental law and the establishment of a limited state, and produced possibly our greatest contribution to constitutional government—the state constitutional convention which became the agent of original sovereignty in proposing our state constitutions and in ratifying the Constitution of the United States. It was by this means that governments limited by a fundamental law were established in this country by the quiet deliberation of free men—a much more challenging spectacle in the history of liberty than the forcing of a drunken King to sign Magna Charta at Runnymede by the Barons of England in 1215, though both events had for their purpose the establishment of a government of law.

Jefferson was among the first if not the first to realize the significance of the state constitutional convention as a part of the process of establishing a fundamental law and a limited government. The purpose of this process was to abolish legislative or executive supremacy and to establish the supremacy of a fundamental law maintained by judicial review. Jefferson had no confidence in either legislatures or executives.

The first constitution of Virginia was framed and adopted June 29, 1776, before the Declaration of Independence was issued, by a rump session composed of forty-five members of the colonial House of Burgesses without any commission from the people and without referring their proposal to the people for ratification.⁹ In other

⁹Ben Perley Poore, *The Federal and State Constitutions*, (2nd Ed., 1878) II, 1910.

words, a part of one of the Houses of the Virginia legislature assumed and exercised the power of adopting a constitution for Virginia, thus providing for legislative supremacy. Jefferson vigorously attacked this assumption of power, contending that despite the fact that the document called itself a constitution and even provided for the separation of powers, it was not a fundamental law and, therefore, provided for legislative supremacy because the same authority that made it could change it. Here Jefferson contends that a legislative body is not the proper body to adopt a constitution. "It is not the name," he said, "but *the authority* that renders an act obligatory."¹⁰ A constitution or a fundamental law, he said, is not a mere matter of name or form, but of substance. It must be the act of the sovereign people to make it "obligatory." By obligatory, he meant supreme. "The other states in the Union," said Jefferson, "have been of the opinion that to render a form of government *unalterable by ordinary acts of assembly*, the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments."¹¹ "A constitution," he said, "must be an act above the power of the ordinary legislature," otherwise, "there is no *legal obstacle* to the assumption by the assembly of all the powers legislative, executive, and judicial."¹² Here Jefferson maintains that only a fundamental law will furnish "a legal obstacle" to the assumption of supremacy by the legislative body. By "legal obstacle" he means judicial review.

In the summer of 1783 it was expected that a constitutional convention would meet in Virginia with special powers delegated to it to draft and adopt a constitution. While the convention did not meet, Jefferson drafted a fundamental constitution to be submitted to it. Jefferson stated that the purpose of the convention was "*to form a constitution for them, and to declare those fundamentals to which all our laws present and future shall be subordinate.*"¹³ In other words, a fundamental constitution was to be substituted for the legislative-made constitution of 1776, and it was to be supreme over legislative acts.

In the constitution which Jefferson proposed is found the following specific negation on legislative supremacy: "*The general assembly shall not have power to infringe this constitution. . . .*"¹⁴

¹⁰Writings (Library Ed.) II, 169.

¹¹*Ibid.*, II, 171.

¹²*Ibid.*, II, 173.

¹³*Ibid.*, II, 282-283.

¹⁴*Ibid.*, II, 287.

There are several absolute prohibitions on the legislature in his proposal. He refers to laws "*not inconsistent with this constitution.*"¹⁵ He further states "*that a convention is necessary for altering this constitution.*"¹⁶ Here Jefferson proposed a fundamental law for Virginia by means of a constitutional convention, that it shall be altered and amended by the same means, and that "*a legal obstacle*" or judicial review shall prevent its destruction. In these statements of Jefferson is found the complete foundation of American constitutional law made a decade prior to the establishment of our present Constitution.

Judicial Review as the Means of Harmonizing the Federal System

Not only was Jefferson the first to contend that the state constitution should be a fundamental law and that judicial review should be used to preserve it, but he was among the first, if not the first, to see that judicial review was the proper means of preserving federalism. The Virginia proposal for our present Constitution suggested that Congress be given the power to repeal the acts of the states controvening the Articles of Union.¹⁷

Jefferson was in Paris during the time the Federal Convention was sitting, and on receiving a copy of the Virginia proposal from Madison, he immediately replied June 20, 1787, saying: "The negative proposed to be given them (the Congress) on all the acts of the several legislatures, is now for the first time, suggested to my mind. *Prima facie*, I do not like it. It fails in an essential character; *that the hole and the patch should be commensurate*. But this proposes to mend a small hole by covering the whole garment. Not more than one out of one hundred state acts concern the confederacy. This proposition, then, in order to give them one degree of power, which they (the Congress) ought to have, gives them ninety-nine more, which they ought not to have, upon the presumption that they will not exercise the ninety-nine. But upon every act, there will be a preliminary question. Does this act concern the confederacy? And was there ever a proposition so plain, as to pass Congress without debate? Their decisions are almost always wise; they are like pure metal. But you know of how much dross this is the result."¹⁸

The substance of Jefferson's objection is that the danger and

¹⁵*Ibid.*, II, 299.

¹⁶*Ibid.*, II, 298.

¹⁷Farrand, *op. cit.*, I, 28.

¹⁸Writings (Library Ed.) VI, 132.

the remedy are not co-extant. The remedy is not restricted to the evil. To give Congress the power to repeal one act of a state legislature, it is necessary to give it the power to repeal all the acts of all the state legislatures contravening the Articles of Union in order to establish the principle and in the end the principle becomes that of congressional supremacy over the states limited only by its discretion. In principle and law a unitary republic would be established but Congress might suffer the provinces to have such autonomy as it saw fit.

What was Jefferson's solution? "Would not an *appeal*," he asked, "*from the state judicature to a federal court, in all cases where the act of confederation controlled the question, be as effectual a remedy, and exactly commensurate to the defect?*"¹⁹

What does this suggestion of Jefferson's mean? At least four significant matters are involved. First, that judicial review by both state and federal courts be substituted for congressional supremacy as the means of maintaining the act of confederation, meaning, of course, the constitution. Second, that this review be restricted to actual cases involving the act of confederation, or as we say, a federal question. Thirdly, that this review should first be exercised by the state courts, and fourthly, that in case the state courts sustained unconstitutional state legislation an appeal to federal courts would give an opportunity for reversal of such decisions. So far as I have been able to discover from the writings of the forefathers this was the first time judicial review restricted to actual cases involving federal questions was suggested as the proper means of preserving the federal principle. It was proposed as a means of coercing the states but only in accordance with the constitution. Its main object was to protect the states from congressional supremacy.

Jefferson gave an illustration of how his proposal would work. "A British creditor, for example, sues for his debt in Virginia; the defendant pleads an act of the state excluding him from their courts; the plaintiff urges the confederation and the treaty made under that, as controlling the state law; *the judges are weak enough to decide according to the view of their legislature*. An appeal to a federal court sets all to rights."²⁰ It is clear from Jefferson's suggestions that he regarded the "act of confederation" or the constitution and a treaty as the supreme law of the land, that an act of a state violating this supreme law was unconstitutional, and that the courts, not the

¹⁹*Ibid.*, VI, 132.

²⁰*Ibid.*, VI, 132.

Congress, were the proper agents to pass upon the question of constitutionality because the remedy would be restricted to actual cases; in Jefferson's words, the patch and the hole would be coextant.

Jefferson did not say specifically that an act of Congress violating the supreme law would be subject to judicial review, but the logic of his solution of the problem of the relation of Congress to the states would make this necessary because if judicial review could be used only as a check on state legislatures, congressional supremacy would result. Again, it is to be noticed that in his reference to the "act of confederation" and a "treaty" being the supreme law he excludes an act of Congress. Moreover, when the forefathers used the expression fundamental law or constitution, they always meant that legislative acts were subordinate to it and could only be law when in harmony with it, and that this distinction would amount to the sum total of nothing unless it was enforced by the courts. Otherwise, constitutionality would become legislative discretion. The forefathers knew that a legislative body could be as tyrannical as an executive. In 1789, Jefferson said: "The tryanny of legislatures is the most formidable dread at present."²¹ In contending for a fundamental law for Virginia in 1782 as a means of controlling the legislature, he said: "One hundred and seventy-three despots would surely be as oppressive as one."²²

It has been my purpose first to show that Jefferson was the most persistent advocate among the forefathers of the importance of a fundamental constitution, of the foundation of such a law upon the sovereignty of the people, of a constitutional convention as the proper means for establishing such a law independently of legislative bodies, of judicial review as the necessary means for maintaining a fundamental law, and of amendment process limiting the changing of such a law to its creators—the people. Here is the complete foundation of constitutional government. In 1824—two years before his death, Jefferson said: "Virginia of which I am myself a native and resident, was not only the first of the states, but, I believe I may say, *the first of the nations of the earth*, which assembled its wise men peaceably together to form a *fundamental constitution*, to commit it to writing, and place it among their archives, where *every one should be free to appeal to its text*."²³ If Virginia was the first state in the history of man to formulate and reduce to written form a *fundamental constitution* and Jeffer-

²¹Works (Ford Ed.) V, 83.

²²*Ibid.*, III, 223.

²³Writings (Library Ed.) XVI

son was its leader in this achievement, then he becomes the founder of constitutional government.

The Bill of Rights

Not only was Jefferson foremost among the founding fathers in establishing the fundamental principles of the Constitution, but he was primarily responsible for the addition of a Bill of Rights guaranteeing its protection of the inalienable rights of man. He was steeped in the philosophy of natural law which was the basis of the American Revolution and is the basis of American constitutional law. The higher law doctrine of the natural law is the essence of a fundamental law.

"A bill of rights," he said, "is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inferences."²⁴ "I disapproved from the first moment," he said, "that want of a bill of rights (in the new constitution), to guard liberty against the legislative as well as the executive branches of the government; that is to say, to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury, in all cases determinable by the laws of the land."²⁵

He favored ratification of the Constitution by a sufficient number of states to put it into effect, but hoped that the other four would demand a bill of rights as a basis for their ratification. "I sincerely rejoice," he said, "at the acceptance of our Constitution by nine states. It is a good canvas on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights."²⁶

Jefferson had great confidence in a properly constituted judiciary of able and independent judges. His advocacy of judicial review as a means of preserving the Constitution was based on this confidence. He regarded a bill of rights as an extension of the scope of this safeguard. In reviewing the arguments made by Madison for a bill of rights, he said, "You omit one which has great weight with me: *the legal check which it puts into the hands of the judiciary*. This is a body which if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity. In fact, what degree of confidence would

²⁴Works (Ford Ed.) IV, 477.

²⁵*Ibid.*, V, 45.

²⁶Writings (Washington Ed.) II, 445.

be too much for a body composed of such men as Wythe, Blair, and Pendleton? On characters like these, the '*civium ardor prava jubentium*! (the crying of a mob for the violation of law)' would make no impression."²⁷

When Jefferson said a bill of rights would place a "legal check" in the hands of the judiciary, he meant that the individual was being given an extra protection for his rights by virtue of the fact that he could appeal to the judiciary against the usurpations of the political divisions of our governments. To him it was an additional limitation upon political authority to be enforced by judicial review. Here again Jefferson is the unexampled champion of the liberty of the individual protected by a fundamental law and judicial review.

Jefferson Principles for Preserving the Constitution

It was natural and fortunate for the country that, after spending so much time, thought, and energy as well as pledging his sacred honor and fortune for the establishing of constitutional government, Jefferson would be jealous of its preservation. His contribution toward preserving the Constitution was no less important than that made in its establishment.

No man ever loved the Constitution more than Jefferson. He called it the "*lex-legum*"—the law of laws. He said, "our peculiar security is in the possession of a written constitution. *Let us not make it a blank paper by construction.*"²⁸ "Though written constitutions may be violated in moments of passion or delusion," Jefferson said, "yet they furnish a text to which those who are watchful may again rally and *recall* the people. They fix, too, for the people the principles of their political creed."²⁹ Again, he said: "It is a misfortune that our countrymen do not sufficiently know the value of their constitutions and how much happier they are rendered by them than any other people on earth by the governments under which they live."³⁰ "The worst of the American constitutions," he said, "is better than the best which ever existed before in any other country, and they are wonderfully perfect for a first essay."³¹ Jefferson was truly a constitutional worshipper. He once spoke of "the adored principles of the Constitution."³² "The Constitution," he said, "is unquestionably the finest ever presented to men."³³

²⁷*Ibid.*, III, 3.

²⁸Works (Ford Ed.) VII, 247.

²⁹*Ibid.*, VIII, 159.

³⁰*Ibid.*, IV, 455.

³¹*Ibid.*, IV, 403.

³²*Ibid.*, X, 215.

³³*Ibid.*, V, 80.

Jefferson's Theory of Construction

It is now clear to all students of constitutional law that Jefferson foresaw that if the Constitution was ever destroyed it would be done by construction or interpretation, in final analysis by the Supreme Court. Jefferson once said: "Our government is now taking so steady a course as to show by what road it will pass to destruction, to wit: by consolidation first, and then corruption, its necessary consequence. *The engine of consolidation will be the federal judiciary*; the two other branches the corrupting and corrupted instruments."³⁴ Again, he spoke of the Federal Judiciary as "the germ of dissolution."³⁵

This is why Jefferson insisted on a strict construction of the Constitution and founded a party to perpetuate his constitutional principles. "When an instrument admits two constructions," he said, "the one safe, the other dangerous; the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, *than to assume it by construction* which would make our powers boundless."³⁶ "Strained constructions," he said, "loosen all the bands of the Constitution."³⁷ "If on (one) infraction (of the constitution) we build a second, on that second a third, etc.." he said, "any one of the powers in the Constitution may be made to comprehend every power of government."³⁸ "On every question of construction," he said, "carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."³⁹ He believed by an historical approach and by a consultation of the debates of those who framed and ratified the Constitution its true meaning could be discovered. If, when this was done, it was found that the powers of the government were inadequate to the needs of the nation, he favored the use of the amendment process.

There was no place in Jefferson's theory of construction for the *adaptive philosophy* announced by Chief Justice Marshall in *McCulloch v. Maryland*, (1819) that the constitution was "intended to endure for ages to come, and, consequently, *to be adapted*

³⁴Writings (Library Ed.) XV, 341.

³⁵*Ibid.*, XV, 331.

³⁶Works (Ford Ed.) VIII, 247.

³⁷*Ibid.*, X, 81.

³⁸*Ibid.*, VIII, 174.

³⁹*Ibid.*, X, 230.

to the various crises of human affairs."⁴⁰ Was the Constitution to be adapted by the Court or the amendment process? If by the Court, then the extent or scope of the adaptation, limited only by the discretion of the Court as Chief Justice Stone has said, could make, and in my opinion, has made the amendment process unnecessary so far as the fundamental powers of the national government are involved. It might be used to change some of the purely mechanical or structural features of our system. This means that the Court has become the substitute for the sovereignty of the American people in amending the Constitution and is a *permanent constituent convention*. As Jefferson once said: "*The Constitution is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.*"⁴¹ It is both interesting as well as tragic to discover Jefferson making these charges against a Federalist Court for doing to a limited extent what the Court now is doing without limit under the auspices of his party.

Emphasis on the Amendment Process

Jefferson regarded the amendment process as one of the great principles of a fundamental law and constitutional government. It was the life-giving blood of a fundamental law and always evidence that government rested upon "the consent of the governed." "Happily for us," he said, "that when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers, and set them to rights, while every other nation on earth must have recourse to arms to amend or to restore their constitution."⁴² "Whatever be the Constitution," he said, "great care must be taken to provide a mode of amendment, when experience or change of circumstances shall have manifested that any part of it is unadapted to the good of the nation." If the amendment process "is found too difficult for remedying the imperfection which experience develops from time to time in an organization of the first impression, a greater facility of amendment is certainly requisite to maintain it in a course of action accommodated to the things and changes through which we are ever passing."⁴³

In contrast then with the *adaptive theory* of interpreting the Constitution, Jefferson contended for a logical, natural and his-

⁴⁰ (1919) 4 Wheat. 316, 4 L. Ed. 579.

⁴¹ Writings (Library Ed.) XV, 213.

⁴² *Ibid.*, VI, 295.

⁴³ *Ibid.*, XV, 488.

torical meaning of the Constitution consistent with the document and in harmony with the intentions of the framers discovered by a study of their writings and the debates of the drafting and ratifying conventions. When this meaning proved inadequate for the exigencies of the nation, the only constitutional means for changing it was to consult the sovereignty of the American people by the amendment process. He believed that when the Constitution was changed by any other process it ceased to be a fundamental law. Time has vindicated the validity of his contention.

Fear of Consolidation

"There is no danger I apprehend so much," he said, "as the consolidation of our government by the noiseless, and, therefore, unalarming instrumentality of the Supreme Court."⁴⁴ "Consolidation," he said, "is but Toryism in disguise."⁴⁵ We are now told that consolidation or centralization is liberalism. Jefferson called it Toryism because all consolidation must end in executive power. The Tories have always been the champions of executive power. This was the issue between Whigs and Tories in the Glorious Revolution of 1688 in Great Britain and between Whigs and Tories in the American Revolution of 1776. What would Jefferson think of the championing of executive power by his political descendants? He answered this question. "The consolidationists," he said, "may call themselves republicans if they please, but the school of Venice, and all of this principle, I call at once Tories."⁴⁶ Of course, a Tory in 1688 in Great Britain and in 1776 in America was a monarchist.

Jefferson once said: "I am not for transferring all the powers of the states to the General Government and all those of that government to the Executive Branch."⁴⁷ Jefferson knew that centralization would convert our system into an executive type of government with a bureaucracy as its agent necessarily exercising very largely the legislative and judicial powers of both the nation and the states. He was the first great anti-bureaucrat in American history.

Emphasis on Judicial Review

Jefferson knew as well as all students of constitutional law know that the only way to prevent consolidation is to preserve the

⁴⁴*Ibid.*, XV, 421.

⁴⁵Works (Ford Ed.) X, 379.

⁴⁶*Ibid.*, X, 378.

⁴⁷*Ibid.*, VII, 327.

line of federalism and the doctrine of separation of powers. Jefferson knew that judicial review had been established largely on his suggestion to Madison in 1787 for this specific purpose. It was his fears of the destruction of the Republic by centralization that made him so bitter against the Court when he saw that it was abusing the power of judicial review by the loose-construction or adaptative theory of interpreting the Constitution always on the side of nationalism. Such cases as *Marbury v. Madison*, (1803),⁴⁸ *McCulloch v. Maryland*, (1819),⁴⁹ *Cohens v. Virginia*, (1821),⁵⁰ and *Gibbons v. Ogden*, (1824)⁵¹ were cited by Jefferson as illustrations of this abuse of power and attempts by the Court to weaken the principles of federalism and the separation of powers.

Jefferson's criticism of the Court has frequently been misconstrued to mean that he was opposed to judicial review. No greater error could be made in evaluating his constitutional principles. He not only suggested judicial review as a principle of the Constitution but he realized that his theory of strict construction could be enforced only by a vigorous and extensive use of judicial review. Strict construction meant a much higher death rate for legislation. No historian has been able to find one word in Jefferson's writings against the principle of judicial review. He was against the abuse of this power by the courts just as he was against the abuse of power by either the President or the Congress. The fact is Jefferson's objection to the Marshall Court was that it did not hold more acts of Congress unconstitutional instead of granting it powers by nationalistic decisions. It is sometimes forgotten that the Marshall Court in a period of 35 years held only a part of one act of Congress unconstitutional and this dealt with the powers of the Court itself. Jefferson's criticism of the decision in *Marbury v. Madison* (1803) was not that an act of Congress had been declared unconstitutional but that the Court by way of *dicta* had attempted to invade the powers of the executive and thus violate the doctrine of separation of powers.⁵²

Separation of Powers

Jefferson realized more keenly than any of his contemporaries that the prevention of consolidation depended on preserving not

⁴⁸(1803) 1 Cranch 137, 2 L. Ed. 60.

⁴⁹(1819) 4 Wheat. 316, 4 L. Ed. 579.

⁵⁰(1821) 6 Wheat. 264, 5 L. Ed. 257.

⁵¹(1824) 9 Wheat. 1, 6 L. Ed. 23.

⁵²See Charles Warren, *The Supreme Court in United States History*, (1923) I, 232.

only the line of federalism but also the independence of the departments of government. "The leading principle of our Constitution," he said, "is the independence of the Legislative, Executive and Judiciary of one another."⁵³ "My construction of the Constitution," he said, "is . . . that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal."⁵⁴ He did not regard "the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."⁵⁵

This quotation separated from its context has frequently been used to prove that Jefferson was opposed to judicial review, but Jefferson himself explained what he meant by it. He said, "If the legislature fails to pass laws for a census, for paying the Judges and other officers of government, for establishing a militia, for naturalization as prescribed by the Constitution, or if they fail to meet in Congress, the judges cannot issue their *Mandamus* to them; if the President fails to supply the place of a judge, to appoint other civil or military officer, to issue requisite commissions, the judges cannot force him."⁵⁶ He regarded the pardon power or veto power in this group of exceptions. None of these issues is regarded today as raising a judicial question. Likewise, if the President vetoed an act of Congress on grounds of unconstitutionality, and it was passed over his veto and later brought before the courts, would they be under any constitutional restraint as to its constitutionality because the President regarded it unconstitutional? May not the Congress repass as many times as it sees fit any act previously declared unconstitutional by the courts? Has not the Supreme Court frequently—possibly too frequently—changed its mind on questions of constitutionality? This is what Jefferson meant by an independent discretion in each of the three departments of government as to its powers.

Independent Judiciary

No American statesman ever stood for a greater independence of the Judiciary than Thomas Jefferson though he believed it should be "kept strictly to their own department."⁵⁷ It cannot be

⁵³Works (Ford Ed.) IX, 60.

⁵⁴*Ibid.*, X, 141.

⁵⁵Writings (Library Ed.) XV, 277.

⁵⁶*Ibid.*, XV, 277.

⁵⁷*Ibid.*, V, 81.

forgotten in this connection that one of the charges which he made against George III in the Declaration of Independence was: "He had made our judges dependent on his will alone, for the tenure of their offices, and the amount and payment of the salaries."

Under our Constitution, he said: "The judges should not be dependent upon *any man*, or *body of men*."⁵⁸ "The Judges," he said, "should have an estate for life in their offices, or in other words, their commissions should be made during good behavior."⁵⁹ "I was against writing letters to the judiciary officers," he said, "*I thought them independent of the Executive, not subject to its coercion, and not obliged to attend to its admonitions.*"⁶⁰ "*The Courts of Justice,*" he said, "*exercise the sovereignty of this country, in judiciary matters, are supreme in these, and liable neither to control nor opposition from any other branch of government.*"⁶¹

Jefferson's constitutional creed then was that "man should be bound down by the chains of the Constitution"—a fundamental law *inviolable* and *unchangeable* except by the consent of the same sovereignty that created it—"the consent of the governed." That its *inviolable* and *unchangeable character* was to be maintained by judicial review and that immortality was to be given it by the amendment process. "*The real friends of the Constitution in its federal form,*" he said, "*if they wish it to be immortal, should be attentive to amendments, to make it keep pace with the advance of the age in science and experience.*"⁶² If the amendment process should prove too rigid to meet this demand, he believed that a "greater facility of amendment should be provided in order that the Constitution might be "accommodated to the times and changes through which we are ever passing." Jefferson never felt, however, that the Constitution was merely "a restricted railroad ticket good for this day and train only,"⁶³ and, therefore, should be changed every Monday by a life-time constituent convention determined upon converting a limited constitutional federal system of government into a unitary authoritarian state as the agent of liberalism. In conclusion it is submitted that if Jefferson's creed had been followed, we would have had not only an immortal Jefferson but an immortal constitution.

⁵⁸Works (Ford Ed.) II, 60, Letter to George Wythe, 1776.

⁵⁹*Ibid.*, II, 60.

⁶⁰*Ibid.*, I, 265.

⁶¹*Ibid.*, VI, 421.

⁶²Writings (Washington Ed.) VII, 336; (Ford Ed.) X, 295.

⁶³Smith v. Alwright, (1944) 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987.